IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 88 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

P. B. CORPORATION

Appearance:

1. INCOME TAX REFERENCE No. 88 of 1992
MR MANISH R BHATT for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA
Date of decision: 15/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred for our opinion in respect of assessment years 1979-80 to 1983-84 :-

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in restoring the matter to the AAC for fresh decision of the appeals when the assessee had not filed any appeal against the additions which have been sustained by the AAC ?"

2. We have heard Mr MR Bhatt, learned Standing Counsel for the revenue. Though served, none appears for the respondent-assessee.

3. During survey operations under Section 133A of the Income Tax Act, 1961, the Income-tax Officer came to know that the assessee carried on business in medicines on wholesale basis and that the assessee also maintained books of accounts but they were not produced before the Inspector during survey. Information was also received that the assessee-firm consisted of four partners carrying on business of manufacture and sale of plot and that the yarn was also purchased. Notices under Section 148 were issued to the assessee to file returns. The assessee filed returns declaring income of Rs.12,800/-, Rs.15,870/-, Rs.16,473/-, Rs.12,770/- and Rs.15,225/- for assessment years 1979-80 to 1983-84 respectively. Notices under Sections 142(1) and 143(2) were not complied with and as such the Assessing Officer estimated the total income at Rs.65,000/-, Rs.75,000/-, Rs.80,000/-, Rs.65,000/- and Rs.75,000/- respectively. The assessee filed appeals before the AAC. The assessee did not appear and as such the appeals were heard ex-parte by the AAC. The AAC reduced Rs.20,000/- from the amount assessed by the Income-tax Officer for each year and directed the Income-tax Officer to assess the income at Rs.45,000/-, Rs.55,000/-, Rs.50,000/-, Rs.43,000/- and Rs.55,000/- respectively.

4. Aggrieved by the above orders, the revenue went in appeal before the Tribunal. The assessee did not appear and the Tribunal heard and decided the appeals after taking notice of the fact pointed out by the departmental representative that in the case of sister concern M/s IBP Corporation, on identical facts, similar assessments were made, the Appellate Assistant Commissioner passed similar orders and the Tribunal in the departmental appeals restored the matter to the Income-tax Officer with a direction to obtain on record some concrete material for estimating the income and then make assessments.

5. In view of the above, when the Tribunal found

that the facts were identical, the Tribunal set aside the orders of the Appellate Assistant Commissioner. However, instead of restoring the matter to the Assessing Officer, the Tribunal thought it fit to restore the matter to the Appellate Assistant Commissioner so that the litigation is shortened. The Tribunal accordingly disposed of the appeals after restoring the matters to the Appellate Assistant Commissioner with a direction that the Appellate Assistant Commissioner would obtain some material on record which would form basis for estimating the income and then decide the appeals finally, of course, after giving reasonable opportunity of being heard to both the assessee as well as to the Income-tax Officer and also after giving them opportunity to bring relevant material on record.

6. Mr MR Bhatt learned counsel for the revenue has submitted that it was the revenue which was aggrieved by the orders of the Appellate Assistant Commissioner. The assessee had not filed any appeal against the orders of the Appellate Assistant Commissioner and, therefore, the Tribunal ought to have proceeded on the footing that the assessee was not aggrieved by the order of the Appellate Assistant Commissioner assessing the income at Rs.45,000/-, Rs.55,000/-, Rs.50,000/-, Rs.43,000/- and Rs.55,000/- respectively for the five assessment years in question and, therefore, the Tribunal ought to have considered the controversy only in respect of the difference between the assessments made by the Income-tax Officer and the assessments made by the Appellate Assistant Commissioner. Mr Bhatt submitted that by setting aside the entire order of the Appellate Assistant Commissioner, the Tribunal has given a fresh innings to the assessee although he had not filed any appeal against the orders of the Appellate Assistant Commissioner.

7. Section 254(1) of the Income-tax Act, 1961 confers the following appellate powers on the appellate Tribunal :-

> "The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

At this stage, we may also note the provisions of Order 41, Rule 33 CPC which read as under:-

> "33. Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or

made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

(emphasis supplied)

It is clear that the appellate Court can pass appropriate orders and the appellate powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection against the order giving rise to the appeal.

8. Apart from the fact that the provisions of Section 254(1) confer very wide powers on the appellate Tribunal, there is nothing in the provisions of the Income-tax Act which would have the effect of nullifying the provisions of Order 41, Rule 33 CPC or the principle underlying the said provision that the appellate Court may pass such order or decree as the case may require and this would also include passing orders in favour of any of the respondents although such a respondent may not have filed any appeal or objection.

9. In the facts of the instant case, the Assessing Officer exercised powers under the provisions of Section 144 because the notices under Section 142(1) and 142(2) of the Income-tax Act were not complied with by the assessee and the Income-tax Officer substantially enhanced the assessment for the concerned five years. Once the Tribunal found that there was no warrant for assessing the income at the particular amounts mentioned hereinabove, it was but natural that the entire matter was required to be kept at large and to permit the parties to lead evidence. In this set of circumstances,

the assessee could not have been tied down to the amounts assessed by the Appellate Assistant Commissioner and the Tribunal, therefore, rightly set aside the assessment orders passed by the Appellate Assistant Commissioner as well.

The question whether the matters should have been remanded to the Appellate Assistant Commissioner or to the Income-tax Officer, need not detain us because in the first place the assessee is not aggrieved by the orders of the Tribunal and has not sought any reference and secondly the Tribunal directed the Appellate Assistant Commissioner to permit both the parties to bring relevant material on record and to given them an opportunity of hearing and thereafter to decide the appeals. Hence, for all practical purposes, there would be no material difference, whether the matter is remanded to the Income-tax Officer or to the Appellate Assistant Commissioner.

10. In view of the above discussion, we answer the question in the affirmative i.e. in favour of the assessee and against the revenue.

The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

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